

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No.

BENJAMIN MALTZ, AN INDIVIDUAL DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,

Petitioner,

vs.

GEORGE D. SAX, ET AL.,

Respondents.

BRIEF AND ARGUMENT FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions Below.

No opinion was rendered or filed by the trial judge. The order of the District Court dismissing the complaint is found in the record (Rec. p. 17).

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 134 Fed. (2) p. 2. This opinion also appears in the record (Rec. pp. 33 to 37).

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended (Title 28, U.S.C.A., Sec. 347).

The last order in the cause was the order of the Circuit Court of Appeals denying petitioner's petition for rehearing, which was entered on March 27, 1943 (Rec. p. 39). The order affirming the dismissal order of the District Court was entered in the Circuit Court of Appeals, for the Seventh Circuit, on February 26, 1943 (Rec. p. 33).

III.

Petitioner assigns as error:

(a) That the Circuit Court of Appeals erred in assuming that the manufacture, sale and distribution of the product manufactured by the plaintiff and the defendants, to-wit: gambling devices, was against the public policy of the United States.

(b) That the Circuit Court of Appeals erred in asserting that the public policy of the United States was such that the manufacturers of gambling devices are engaged in a business contrary to the public policy of the United States.

(c) That the Circuit Court of Appeals erred in declaring that the petitioner here was in *particeps criminis* either with the defendants or with those persons who purchased the product manufactured by petitioner.

(d) That the determination and opinion of the Court of Appeals is contrary to the decisions of this Court, particularly the decision and opinion in *Keystone Co.* v. *Excavator Co.*, 290 U.S. 240, 245.

(e) That the Circuit Court of Appeals erred in imposing sanctions on the plaintiff contrary to a proper interpretation of the Sherman Anti-Trust Act.

(f) That the decision of the Circuit Court of Appeals is contrary to a decision and opinion of that Court in the case of *Roseland* v. *Phister Mfg. Co.*, 125 Fed. (2d) p. 417.

IV.

ARGUMENT.

A.

The Circuit Court of Appeals has refused to accept the admonitions of this Court and has declared a public policy of the United States which imposes sanctions upon plaintiffs bringing civil proceedings for treble damages under the Sherman Anti-Trust Act, contrary to a proper interpretation of the legislative intent.

The case was brought to the United States Circuit Court of Appeals, for the Seventh Circuit, and now to this Court, based upon a record which concedes that the factual allegations of petitioner's complaint are true. Thus, the complaint (Rec. pp. 3 to 10) makes out a clear case wherein the defendants have banded and associated themselves together for the purpose of controlling the price of a manufactured product sold to dealers, jobbers and distributors throughout the United States. The record further concedes that these defendants sell in excess of 65% of the total volume of the product sold in the United States. It is further alleged and charged in the complaint that the defendants, by concerted action, engaged in a campaign to stifle plaintiff's competition by a price cutting campaign, with the intent and purpose of forcing him out of business. Therefore, the complaint presents a clear case of combination and conspiracy in violation of the express provisions of the Sherman Anti-Trust Act. (*United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 213; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 485.)

The case involving, as it does, the interpretation of an act of the Congress, requires an enunciation of legal prin-

ciples of Federal law distinguished from State law; neither the common law nor the statutory law of the State of Illinois need be followed by this Court. (*D'Oench Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 471; *Hinderlider* v. *La-Plata Co.*, 304 U. S. 92, 110; *Dietrick* v. *Greaney*, 309 U. S. 190, 200.)

Whether it is urged that the position taken by the Court of Appeals is in furtherance of the exercise of what might be termed "judicial prerogative" or interpolation of legislative policy, it must be conceded that the decision and opinion imposes sanctions on injured persons, not found in the act itself.

The effect of the opinion of the reviewing court is to declare a public policy which neither appears in the Sherman Anti-Trust Act itself nor in its historical object and purpose. The act itself does not declare that certain business endeavors are unlawful; nor that persons engaged therein cannot maintain civil actions for treble damages. Thus, the decision and opinion is contrary to the decision and opinion of this Court in *Frost* v. *Mines Corp.*, 312 U. S. 38.

The Circuit Court of Appeals also declares (not on the basis of *stare decisis* but as an original declaration on its part) that the articles of commerce involved herein are gambling devices. We call attention to the opinion of the Attorney General of the United States, (Vol. 22, Opinions of the Attorney General of the United States, p. 196) to the effect that these devices, until they are in the hands of the ultimate user, are not gambling devices but are machines; and that there is no gambling involved in the sale of the machine itself.

However, for the purpose of our challenge here, we proceed upon the assumption that the Court of Appeals correctly stated that the product involved herein is a gambling device.

B.

The Circuit Court of Appeals has declared it to be the common law public policy of the United States that gambling per se is against such a national policy, and, therefore, that the manufacture, sale and distribution of such devices are contrary to public policy. There is no common law public policy of the United States making unlawful the manufacture and distribution of gambling devices. The pronouncement of the Court of Appeals represents judicial fiat and defies basic constitutional precepts.

Defiant of the admonitions of this Court, suggesting that the time has come when the courts should not engage in the business of policy making in the Sherman Anti-Trust cases (*Tigner* v. *Texas,* 310 U. S. 141; *United States* v. *Cooper Corp.,* 312 U. S. 600) we respectfully submit that the reviewing court here has engaged in an interpretation which is contrary to the policy of the act. In effect, the reviewing court has declared policy.

The Federal Congress (other than in the lottery statute originally passed in 1895) has not seen fit to legislate as to gambling, in spite of the fact that both in the organic documents and by legislation gambling has been condemned in a large number of the states. The Federal Congress never at any time during its entire history sought to legislate as to the transportation of gambling devices (other than lottery) in interstate commerce. From this failure to legislate, it must be concluded that the Congress has at all times been of the opinion that the questions of gambling are matters inherently within the police power of the states, and that the states should be left each to determine its own policy.

The effect of the opinion of the Circuit Court of Appeals here is to pass judgment upon these moral issues, in spite

of the silence of the legislative branch of government, and thereby to all intents and purposes, to legislate such a public policy into existence, not only in defiance of the Federal Constitutional restraints as to the division of governmental powers, but to create, contrary to fundamental precepts, either a common law criminal law on the subject or to enforce the criminal laws of the states.

Gambling *per se* was not unlawful under the common law of England. Where gambling transactions were considered unlawful, such cases offer the exception rather than the rule. It was not until 1845 that the English Parliament attempted to pass legislation making unlawful certain phases of gambling. (See Vol. 25, English and Empire Digest, p. 396; Vol. 8, Compiled Statutes of England, 1104; *Hodgson* v. *Temple* (1913) 5 Taunt 181; *Smith* v. *Aiery* (1704) 6 Mod. 128; *DaCosta* v. *Jones* (1778) 2 Cowp. 728; *Gilbert* v. *Sykes* (1812) 16 East 150; *Morgan* v. *Pettit*, 4 Ill. 529).

If there is a federal common law of the case, then the common law of England in existence at the time of the adoption of the Constitution appears to be the starting point. (See *Smith* v. *Alabama*, 124 U. S. 465, 477-479; *Exparte Wilson*, 114 U. S. 417; *Maddox* v. *United States*, 156 U. S. 237, 243; *Standard Oil Co.* v. *United States*, 221 U. S. 1; Common Law and our Federal Jurisprudence, 74 Univ. of Pa. Law. Rev., p. 270.)

Gambling is as old as man. Throughout history, gambling laws have been flaunted and nullified by citizens as a whole. We submit that there has also been a change in legislative policy in the past twenty-five or thirty years. It will be recalled that in many states trading on recognized stock and grain exchanges was looked upon with disfavor as gambling, unlawful and as against public policy. In Illinois for many years the Supreme Court has struck down legislation which sought to legalize trading

in futures on the various exchanges. In Illinois, however, and in 1942, the Supreme Court of Illinois recognized the change in public opinion, and sustained legalizing legislation. (See *Woerter, Rec.* v. *Lamson,* 380 Ill. 35.) Then, too, horse racing and particularly betting on the result, has been treated for many years as gambling and unlawful. In Illinois, however, as well as in many other states and in the past few years, horse racing and betting have been made lawful by statutory enactments or by a recognition on the part of the courts that public opinion demands a change in the policy. (See *People* v. *Monroe,* 349 Ill. 270.) We respectfully submit that the evolutionary process tends towards a public policy which permits persons of mature years to determine as a matter of conscience as to their activities in the field of gambling.

Respondents in the first instance and the trial court and reviewing court seized upon what appears to us to be *obiter dicta* appearing in the opinion of this Court in the case of *Federal Trade Commission* v. *Keppel Bros.,* 291 U. S. 304. It is noted that this Court was very careful in stating that the case did not involve private parties and was a case involving the public and the public interest. A public agency appears as the moving party. The case involved children and the palming-off on children, by a gambling process, of inferior merchandise. It is submitted that the language used in support of the position taken by this Court was limited to the case at bar and similar cases then pending in the courts and before the Federal Trade Commission; and that it was not intended by this opinion to forevermore declare that there is a national public policy which makes all gambling transactions unlawful *per se.*

The opinion of the Court of Appeals closes the door of the courts of the United States to all civil actions where the sale of gambling devices are involved, and even to

those who might deal with manufacturers thereof with knowledge of the character of their business. Thus, there is read into all of the legislation of the Congress of the United States a proviso and exception where the Congress itself has not specifically spoken upon the subject or created any proviso or exception with reference to the subject matter. Such a decision of the court and declaration of public policy is far reaching and should not be permitted to come from the courts but should be left to that branch of the government primarily charged with the duty of declaring public policy, viz.: the legislative branch of the government.

C.

The parties to this cause are not in particeps criminis, nor does the plaintiff come into court with "unclean hands."

We submit that from a reading of the opinion of the Court of Appeals (Rec. p. 36) it would seem that the learned judge writing the opinion was not too certain about the declared doctrine of "unclean hands." He seeks to justify the decision on the basis of the doctrine of *particeps criminis* between the plaintiff and those who buy his gambling device.

It is urged here, and we urged in that court in our Petition for Rehearing, that the doctrine of *particeps criminis* cannot apply under any circumstances. There is no federal common law criminal law; this is axiomatic. There is no legislation of the Congress declaring any phase of the program to be a crime. Therefore, how is it possible for a court of the United States to say that persons who are not engaged in criminal conduct are in *particeps criminis?*

Neither can it be successfully urged that the plaintiff comes into court with "unclean hands." The parties here are dealing at arm's length; they are competitors. The

cause of action arises out of unfair competition in the competitive process—the arm's length dealing. There is not and could not be any relationship between the "unclean hands" and the relief sought. The decision of the Circuit Court of Appeals is defiant of the principles enunciated by this Court (See *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 246). We submit that the statement of the Circuit Court of Appeals, for the Second Circuit, in the case of *Gillman* v. *Stern*, 114 Fed. (2d) 28, 32, applies here, to-wit:

> "The defense sits especially ill in the mouth of one who is himself an offender, and who seeks recrimination to continue his invasion of the other's rights and avoid restitution."

We respectfully submit that the effect of the order of the trial court, and certainly the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, is to declare that the door of the courts of the United States are completely closed to civil proceedings involving this business; and to give "lip service" to a doctrine that the "law of the jungle" applies to those engaged in this type of business, and those dealing with them, and throughout the United States.

Respectfully submitted,

MYER N. ROSENGARD,
Counsel for Petitioner.